STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	)	
-vs-	)	
	)	Docket No. 00-0700
Illinois Bell Telephone Company, d/b/a Ameritech Illinois Investigation into Tariff Providing Unbundled Local Switching with Shared Transport	)	

Data Net Systems, L.L.C.
and
Illinois Public Telecommunications Association
Reply Brief

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DATA NET SYSTEMS, L.L.C. AND ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION REPLY BRIEF [1]

Data Net Systems, L.L.C. ("Data Net") and the Illinois Public Telecommunications Association ("Payphone Association") respectfully submit that, contrary to the assertions of Illinois Bell Telephone Company ("SBC Ameritech") in its Initial Brief, SBC Ameritech is required to create new network element combinations upon the request of a competitive local exchange carrier ("CLEC") to provide new and additional lines, and to allow a CLEC to use network elements or a network elements platform to provide intraLATA toll service, as expressly mandated by the Illinois Public Utilities Act ("Illinois Act"). SBC Ameritech's arguments seeking to prevent its provisioning of network elements for intraLATA toll service or seeking to support its refusal to provide a CLEC with network element combinations for new and additional lines, as proposed in Sections VI and VII of SBC Ameritech's Initial Brief, are expressly rejected

[1] Data Net and the Payphone Association submit the instant Reply Brief to address the matters explicitly stated herein. The omission of reply to any other matters raised in the initial briefs does not indicate concurrence with or lack of objection thereto.

by the requirements of the Illinois Act, Section 13-801. SBC Ameritech's argument interweaving statutory construction analysis regarding the minimum national federal requirements of the Federal Telecommunications Act of 1996 ("Federal Act") with blanket conclusions of federal preemption are not properly before the Illinois Commerce Commission ("Commission") and are unsupported as a matter of law. Data Net and the Payphone Association respectfully submit that the Commission comply with its statutory mandate to require SBC Ameritech to provide a requesting CLEC with unbundled or bundled network element combinations, including a network elements platform for end to end service, for existing, new, and additional lines, to provide any and all telecommunications services within the LATA, including intraLATA toll service.

I. THE COMMISSION IS REQUIRED TO IMPLEMENT THE ILLINOIS ACT's REQUIREMENTS FOR SBC AMERITECH TO PROVIDE NETWORK ELEMENTS FOR INTRALATA TOLL SERVICES, AND FOR NEW AND ADDITIONAL LINES, WITHOUT LIMITATION AND WITHOUT QUESTIONING THE ILLINOIS ACT'S VALIDITY.

SBC Ameritech argues that network elements and the network elements platform cannot be used by a CLEC to provide intraLATA toll service. SBC Ameritech Br., Section VI. SBC Ameritech further argues that controlling federal policy prohibits any requirement that SBC Ameritech create new network element combinations for a CLEC to provide new and additional lines. SBC Ameritech Br., Section VII. Both of these matters are expressly addressed in the Illinois Act, which requires Ameritech both to provide network elements and network element combinations to enable a CLEC to provide any and all telecommunications services within the LATA, including intraLATA toll service, and to provide network element combinations as requested for both existing and new telecommunications services, including new and additional

lines. 220 ILCS 5/13-801(a) and (d). In the face of clear statutory language, the Commission is obligated to implement the Illinois Act's requirements and has no authority to consider any arguments regarding the constitutionality of the Illinois Act or to question its validity.

A. The Illinois Act Requires SBC Ameritech to Provide Any Requesting CLEC with Network Elements for the Provision of IntraLATA Toll Telecommunications Services.

The Illinois Act imposes the express statutory obligation on SBC Ameritech to provide CLECs network elements and network element combinations, for any and all new and existing telecommunications services within the LATA, including intraLATA toll. In the face of its clear statutory obligations, the arguments presented by SBC Ameritech are irrelevant regarding: (1) whether the Federal Communications Commission ("FCC") has found a federal duty on SBC Ameritech, under the Federal Act, to provide network elements for intraLATA toll service; (2) whether the Commission could find a duty under the Federal Act under the impairment standard; or (3) whether the Commission has already ordered SBC Ameritech to provide network elements for use in the provision of intraLATA toll service. The State of Illinois explicitly recognizes SBC Ameritech's obligation to provide network elements to CLECs, on request, for the provision of any and all intraLATA services, including intraLATA toll services.

> An incumbent local exchange carrier shall provide a requesting telecommunications carrier with ... network elements ... on just, reasonable, and nondiscriminatory rates, terms, and conditions to enable the provision of any and all existing and new telecommunications services within the LATA, including, but not limited to, local exchange and exchange access. The Commission shall require the incumbent local exchange carrier to provide ... network elements in any manner technically feasible to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings. As used in this Section, to the extent that ... network elements have been deployed for or by the incumbent local exchange carrier or one of its wire line local exchange affiliates in any jurisdiction, it shall be presumed that such is technically feasible in Illinois.
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> 220 ILCS 5/13-801(a).

The Illinois Act goes on to reiterate that all of SBC Ameritech's network elements that are included in end to end telecommunications services are available to CLECs for any and all, new and existing telecommunications services, throughout the LATA, including intraLATA toll.

§13-801(d).

> (4) A telecommunications carrier may use a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service for the provision of existing and new local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone service providers without the requesting telecommunications carriers provision or use of any other facilities or functionalities.
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> 220 ILCS 5/13-801(d)(4).

The Illinois General Assembly has spent two years investigating the issues and the state of telecommunications competition in Illinois. This investigation culminated in the passage of House Bill 2900 by a vote of 45 to 2 in the Illinois Senate and 112 to 1 in the Illinois House, and was signed into law as P.A. 92-0022 on June 28, 2001, effective June 30, 2001. The State of Illinois has already determined that network elements and network element combinations, including the network elements platform, shall be provided by SBC Ameritech to any requesting CLEC for "the provision of any and all existing and new telecommunications services within the LATA." 220 ILCS 5/13-801(a). This obligation is not in issue in Illinois.

SBC Ameritech's arguments opposing this requirement ignore the explicit statutory obligation. The Commission should enforce the Illinois Act and require SBC Ameritech to provide network elements to CLECs on request, for the provision of any and all telecommunications services within the LATA, including intraLATA toll.

B. The Illinois Act Requires SBC Ameritech to Provide Combinations of Network Elements for New As Well As Existing Telecommunications Services, and To Combine Unbundled Network Elements on Request.

Similarly, the General Assembly has resolved any issue regarding whether SBC Ameritech has an obligation to provide a requesting CLEC with new network element combinations for the CLEC to provide new and additional lines. The Illinois Act requires that SBC Ameritech "... shall provide a requesting telecommunications carrier with ... network elements ... to enable the provision of any and all existing and new telecommunications services within the LATA ...". 220 ILCS 5/13-801(a). The Illinois Act proceeds further to reiterate this obligation under the network elements subsection of Section 13-801.

> (d) Network elements. The incumbent local exchange carrier shall provide to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to network elements on any unbundled or bundled basis, as requested, at any technically feasible point on just, reasonable, and nondiscriminatory rates, terms, and conditions.
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> * * *
>
> (3) Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket No. 00-0700. The Commission shall determine those network elements the incumbent local exchange carrier ordinarily combines for itself if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act.
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> * * *
>
> (4) A telecommunications carrier may use a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service for the provision of existing and new local exchange, interexchange that includes local, local toll, and

> intraLATA toll, and exchange access telecommunications services within the LATA to its end users or payphone service providers without the requesting telecommunications carrier's provision or use of any other facilities or functionalities.
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> 220 ILCS 5/13-801(d), (d)(3), and (d) (4).

Again, the Illinois General Assembly has investigated this issue and made the determination as to SBC Ameritech's obligations in Illinois. Illinois law expressly requires that SBC Ameritech combine any sequence of unbundled network elements that it ordinarily combines for itself to any requesting carrier for the provision of an existing or new telecommunications service. Pursuant to the Illinois Act, the Commission should order SBC Ameritech to provide the requesting carriers new combinations of network elements for new and additional lines, just as SBC Ameritech is required to provide combinations of network elements for existing lines.

C. The Commission Is Without Authority to Limit or Question the Validity of the Illinois Act.

SBC Ameritech's Initial Brief only made passing recognition to its obligations under the Illinois Act. SBC Ameritech Br. 76. Since its statutory obligations are so explicit, there is little it can say. However, SBC Ameritech makes weak allusion to arguing that any Illinois Act requirements that differ from the Federal Act may be preempted. SBC Ameritech Br. 76. The Commission is without authority to declare any provision of the state statute unconstitutional or to question its validity. Its obligation is to implement the clear and unambiguous language of the Illinois Act.

The Commission is a creature of state statute. It is required to implement and enforce the Illinois Act without extending or altering the operation of the statute. *Gunia v. Cook County Sheriff's Merit Board,* 211 Ill.App.3d 761, 570 N.E.2d 653, 156 Ill.Dec. 177 (1st Dist. 1991), *app.den* 141 Ill.2d 540, 580 N.E.2d 113, 162 Ill.Dec. 487. Furthermore, an administrative body has no authority to declare a statute unconstitutional or to question its validity. *Home Interiors and Gifts, Inc. v. Department of Revenue*, 318 Ill.App.3d 205, 741 N.E.2d 998, 251 Ill.Dec. 820 *rehearing den.* (1st Dist. 2000); *Board of Education, Rich Township High School District #227, Cook County v. Brown*, 311 Ill.App.3d 478, 724 N.E.2d 956, 244 Ill.Dec. 68 *rehearing den.* (1st Dist. 1999) *app.den.* 189 Ill.2d 655, 731 N.E.2d. 762, 246 Ill.Dec. 913, *cert.den.* 121 S.Ct. 383, 148 L.Ed.2d 295. An administrative officer must follow the expressed statutory mandate and may not put into a statute a limitation which the General Assembly did not. *Gray Panthers v. Department of Insurance,* 110 Ill.App.3d 139, 405 N.E.2d 1082, 39 Ill.Dec. 947 (1st Dist. 1982).

The Commission is required to implement and enforce the express requirements of the Illinois Act as enacted.

II. NOTWITHSTANDING THAT THE ILLINOIS ACT'S VALIDITY MAY NOT BE CHALLENGED IN THIS FORM, SBC AMERITECH FAILS TO ESTABLISH ANY FEDERAL PREEMPTION OF ILLINOIS LAW.

Notwithstanding that the Commission lacks authority to declare the Illinois Act unconstitutional or to question its validity, SBC Ameritech occasionally alludes to the Commission's authority to require SBC Ameritech to provide new combinations for new and additional lines, or to require SBC Ameritech to provide network elements to be used in the provision of intraLATA toll service, as being preempted. However, SBC Ameritech fails to

submit an argument for preemption, much less meet its burden of proof in supporting such proposition.

SBC Ameritech cites the *Iowa Utilities Board* line of cases in arguing that the Federal Act does not impose a duty on Ameritech to provide network elements for the provision of intraLATA toll service or to obligate Ameritech to provide new combinations of network elements for new and additional lines. *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753 (8th Cir. 1997) ("*Iowa Utilities Board I*") affirmed in part, reversed in part, and remanded *sub.nom. AT&T Corporation v. Iowa Utilities Board,* 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) ("*Iowa Utilities Board II*"), on remand *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744 (8th Cir. 2000) ("*Iowa Utilities Board III*"). These cases deal with the statutory construction of the Federal Act regarding whether the FCC has jurisdiction to pronounce rules regarding intrastate local telephone service. The decisions dealt with whether the FCC was authorized in its interpretation of the Federal Act and the implementation of obligations on incumbent local exchange carriers ("ILECs"). None of these decisions addressed the imposition of additional obligations imposed on ILECs by the state. It is critical to clarify what the federal decisions addressed and what they did not address.

First and foremost, these decisions addressed what new federal obligations are being imposed on the ILECs and the statutory authority of the FCC to impose such obligations. These are federal obligations and duties of incumbent LECs, not federal requirements and prohibitions against CLECs.

SEC. 251. INTERCONNECTION.

* * *

(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. - In *addition* to the duties contained in subsection (b), each incumbent local exchange carrier has the following *duties*:

* * *

(3) UNBUNDLED ACCESS. – The *duty* to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the *requirements* of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) RESALE. – The *duty* –

(A) to *offer* for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category subscribers from offering such service to a different category of subscribers.

47 U.S.C. § 251(c)(3) and (4). (Emphasis added.)

These are obligations and duties imposed on ILECs as to what they are required to do as a matter of federal law. There are neither restrictions nor obligations on requesting carriers or upon the states. The issue before the federal courts was how extensive are the new federal obligations on ILECs and whether the FCC had authority to impose such duties and obligations.

Neither the U.S. Supreme Court nor either of the 8th Circuit decisions rendered an opinion on what additional obligations may be imposed on ILECs under state law. To question

whether the Federal Act preempts Illinois from imposing a duty on Ameritech to provide new combinations of network elements or to make network element combinations available for the provision of intraLATA toll service, assuming the Federal Act does not so require, the principles of federal preemption of state law must be understood. Since SBC Ameritech only makes casual conclusions of preemption without any preemption analysis, an overview of preemption principles is required.

In a previous interpretation of the Federal Communications Act of 1934, the U.S. Supreme Court identified the standards by which preemption of state law would lie.

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977), when there is outright or actual conflict between federal and state law, e.g. *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).
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> *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 368-369, 106 S. Ct. 1890, 1898, 90 L.Ed.2d 269 (1986).

The Federal Act does not expressly state that state telecommunications law is preempted. Similarly, Congress has not sought through the Federal Act to legislate comprehensively thus occupying the entire field of regulation and leaving no room for the states to supplement federal law. In fact, the statutory language recognizes just the opposite, the continuation of state

telecommunications regulation. 47 U.S.C. § 261(b) & (c). The federal scheme clearly identifies a dual role for both federal and state regulation, which role was recognized by both the U.S. Supreme Court and by the 8th Circuit.

Hines, supra, demonstrates how a state law may stand as an obstacle to the full objectives of Congress. There the Supreme Court was called upon to determine whether a congressional act regarding the registration of aliens could be supplemented with additional requirements imposed by the states. The Supreme Court found that the treatment of aliens involved international relations which, from the country's founding, demanded the exercise of a broad, uniform national authority. The Supreme Court found that the "registration of aliens is of such a nature that the Constitution permits only of one uniform national system." "(W)here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines*, 312 U.S. at 66-68, 73, 61 S. Ct. at 404, 407.

The instant case does not involve a situation: (1) where Congress has expressed in the statute that states are preempted from acting; (2) where Congress has so occupied the entire field that there is no room left for the states to regulate; or (3) where Congress has established one uniform system to which the states can not complement or add. In fact, the Federal Act expressly indicates the Congressional intent to preserve for the states the authority to prescribe and enforce additional requirements.

> SEC. 251(d)(3). PRESERVATION OF STATE ACCESS REGULATIONS. – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C.§ 251(d)(3).

Rather than preempting any further state activity requiring obligations on local exchange carriers for access and interconnection, the Federal Act specifically preserves the state authority. Elsewhere the Federal Act proceeds even further to expressly preserve the state's authority to regulate after the enactment of the Federal Act.

SEC. 261. EFFECT ON OTHER REQUIREMENTS.

* * *

(b) EXISTING STATE REGULATIONS. – Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

(c) ADDITIONAL STATE REQUIREMENTS. – Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

47 U.S.C.§ 261 (b) and (c).

It is the intent of Congress for the states to continue in a dual system of telecommunications regulation where state regulation does not prevent the implementation of federal requirements. This does not mean that the states may only require what is already required by federal law. Such would impose exclusive federal jurisdiction. No purpose is served

by having the states merely repeat what the federal government already requires. Here, Congress clearly elected not to establish exclusive federal jurisdiction.

Where there are concurrent regulatory schemes, and both federal regulations and state regulations coexist, like here, state regulations have been held preempted as inconsistent, or in conflict, with federal regulations where it is physically impossible to comply with both federal and state regulations. *Florida Lime & Avocado Growers, Inc., supra,* 373 U.S. at 142-143, 83 S. Ct. at 1217. Should any preemption exist it must be found to be based upon an outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible

In *Florida Lime & Avocado Growers*, the Supreme Court exemplified what constitutes a physical impossibility. The Supreme Court hypothesized a case where federal regulations forbade the picking and marketing of any avocado testing *more than 7%* oil content, while state regulations forbade the marketing of any avocado testing *less than 8%* oil content. Dual compliance with both federal and state regulations would be impossible. *Florida Lime & Avocado Growers, Inc.,* 373 U.S. at 142-143, 83 S.Ct. at 1217-1218.

Such an impossibility was also presented in *Free, supra.* There federal regulations stated that, for co-owners of a U.S. savings bond registered as payble to one person "or" the other, the surviving co-owner would be the sole owner of the bond. However, the Texas community property law stated that when the co-owners are spouses, the surviving co-owner would *not* be the sole owner of the bond. The United States Supreme Court held that it was physically impossible to comply with the state law holding that the surviving spouse did not become the sole owner while enforcing the federal requirement. Where it is actually impossible to enforce

both the state and federal laws, the state law is preempted by the federal law under the Supremacy Clause.

In the instance circumstance, compliance with the Federal Act and with the Illinois Act is not a physical impossibility and creates no outright or actual conflict between federal and state law. As above noted, the Federal Act imposes minimum federal obligations on ILECs to promote local competition. None of the Federal Act's obligations on ILECs are excused, waived, or prohibited by the Illinois Act. All ILEC obligations found in Section 251 and elsewhere are preserved in the Illinois Act, which expressly imposes "additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the Federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission." 220 ILCS 5/13-801(a).

Prior to the Federal Act, "(s)tates typically granted an exclusive franchise in each local service area to a local exchange carrier ..." which owned the local loops, switches, and transport trunks that constituted a local exchange network. *Iowa Utilities Board II, supra,* 525 U.S. at 371, 119 S.Ct. at 726. When technological advances made competition among multiple providers of local service possible, Congress sought to end "... the long standing regime of state-sanctioned monopolies." *Id.* The Supreme Court found that the purpose of the Federal Act is to prohibit states from continuing the regime of state sanctioned monopolies and from enforcing laws that impede competition.

> The Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56, (1996 Act or Act) fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry. Foremost among these duties is the LECs obligation under 47 U.S.C. § 251(c) (1994 ed., Supp. II) to share its network with competitors.
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> *Iowa Utilities Board II, supra,* 525 U.S. at 371, 119 S.Ct. at 726.

The elimination of the local exchange monopoly, the facilitating of market entry of new competitors, and the obligation of the ILEC to share its network with competitors are the direct purpose of the Illinois Act, consistent with the Federal Act. The Federal Act specifically provides that the states may impose additional intrastate service requirements to those found in the Federal Act to further competition. 27 U.S.C. § 261(c). This is precisely what the Illinois Act addresses, consistent with the purpose and goals of the Federal Act.

On remand, the 8th Circuit did not state that the Federal Act prohibited ILECs from combining previously uncombined network elements. There, the Court addressed whether the FCC was authorized under the Federal Act to impose a duty on ILECs to combine previously uncombined network elements. The Court was addressing the same statutory principal that faces this Commission, an administrative agency may not extend or alter the operation of a statute. According to the 8th Circuit, it did not find the federal statutory requirement for FCC Rule 51.315(c). However, the Court did not find a federal prohibition on ILECs combining previously uncombined network elements.

> ... the issue we addressed in subsections [47 C.F.R.§ 51.315(c)-(f)] was *who* shall be *required* to do the combining, not whether the Act *prohibited* the combination of network elements.
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> * * *
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> It is not the *duty* of the ILECs to "perform the functions necessary to combine unbundled network elements in any matter" as required by the FCC's rule. *See* 47C.F.R.§ 51.315(c). We reiterate what we said in our prior opinion: "[T]he Act does not *require* the incumbent LECs to do *all* the work."
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> *Iowa Utilities Board III, supra,* 219 F.3d at 759. (Some emphasis added.)

ILECs are not *prohibited* from combining new combinations of network elements for requesting carriers. If ILECs were truly prohibited as a matter of federal law, then even

incumbent LECs would not have the option of providing new combinations of network elements. Likewise, the Federal Act does not prohibit the use of network elements for the provision of intraLATA services, including intraLATA toll. "Prohibit" means "To forbid by law; to prevent." Black's Law Dictionary, Fifth Edition, 1979. If the federal law prohibits the provision of new combinations of network elements, then even the ILECs are forbidden by law to provide same. They could not do so voluntarily, nor by contract. Furthermore, state and federal regulatory bodies would be prohibited from approving agreements including an ILEC duty to provide new combinations or to permit the use of network elements for intraLATA toll services. Clearly, such is not the case.

An "obligation" is "That which a person is bound to do or forbear; any duty imposed by law ..." "Duty" is defined as "Obligatory conduct or service. Mandatory obligations to perform." Black's Law Dictionary, Fifth Edition, 1979. Any lack of a mandatory obligation to perform under federal law does not equate to forbidding or preventing the states from applying additional obligations or duties. States' imposition of additional obligations or duties are expressly authorized by the Federal Act. 47 U.S.C. §§251(d)(3) and 261(b) and (c). It is not an "outright or actual conflict" or a physical impossibility for an incumbent LEC to make network elements available to requesting carriers on an unbundled basis under federal law, and also to make new combinations of network elements available upon a CLEC's request, under Illinois law.

The Illinois Act does impose the additional requirement on SBC Ameritech to provide combinations of network elements for existing and new telecommunications services within the LATA, including intraLATA toll. 220 ILCS 5/13-801(a), (d), (d3), and (d4). These additional requirements are wholly consistent with the Federal Act. They are not designed to perpetuate

"the longstanding regime of state-sanctioned monopolies", to "enforce laws that impede competition" or to prevent any of the ILEC's "host of duties intended to facilitate market entry". *Iowa Utilities Board II, supra,* 525 U.S. at 371, 119 S.Ct. at 726. Even if the Federal Act imposes no obligation on ILECs to provide new combinations of network elements for new and second lines, or to permit the use of network elements for the provision of intraLATA toll, the Illinois Act has imposed such additional obligations on SBC Ameritech. This was the specific intent of the General Assembly as stated in the Act.

> (a) This Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission.
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> 220 ILCS 5/13-801(a).

The State of Illinois has already made its determination that the obligations found in the Illinois Act under Section 213-801 are additional state requirements that are not inconsistent with the Federal Act or orders of the FCC. To emphasize that these requirements are in addition to the duties and obligations imposed by the Federal Act, subsection 13-801(a) states further:

> A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall not be subject to the provisions of this section, to the extent that this section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the Federal Telecommunications Act of 1996 and regulations promulgated thereunder.
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> 220 ILCS 5/13-801(a).

This statutory language identifies the General Assembly's intent that Section 13-801 imposes obligations on ILECs that exceed or are more stringent than those found in the Federal Act and the FCC regulations. Carriers not subject to alternative regulation are not subject to Section 13-801 obligations in excess of those federal obligations. However, for carriers such as SBC Ameritech, which is subject to alternative regulation, the General Assembly specifically

intended to impose additional obligations that exceed or are more stringent than the Federal obligations, but which the General Assembly found to be consistent therewith. Although some of the obligations in Section 13-801 are not the same as may be found in the Federal Act, this is inherent in the Federal Act's authorization of the states to provide additional requirements. By definition, any "additional" requirements would not be the same as an existing federal obligation or duty. The question becomes whether the state and federal obligations are inconsistent, as that concept is applied by the United States Supreme Court in its application of the federal preemption doctrine under the Supremacy clause. As shown, no such conflict exist.

When the Federal Act refers to additional state requirements which are consistent with the Federal Act, it is referring to requirements which are not in outright or actual conflict. Such inconsistency would exist if a state excused, waived, or prevented ILECs from providing network elements for the provision of complete end to end exchange services. Since the Federal Act has obligated ILECs to provide network elements in such a fashion, a state regulation or law prohibiting or excusing such end to end combinations would be in actual outright conflict with the Federal obligations. As in the Supreme Court's example in *Florida Lime & Avocado Growers, Inc.*, compliance with both would be a physical impossibility.

However, the Illinois Act which imposes additional obligations and duties on SBC Ameritech is not conflict with SBC Ameritech's federal obligations and duties, nor is compliance with both obligations a physical impossibility. The Federal and State obligations consistently seek to promote competition and to impose duties on ILECs intended to facilitate market entry. *Iowa Utilities Board II, supra;* 47 U.S.C. § 261(c); 220 ILCS 5/13-801(a).

Ameritech is fully capable of providing unbundled network elements in a manner that allows requesting carriers to combine such elements and of also combining previous uncombined

network elements upon a CLEC's request. Even assuming that the Federal Act does not impose the latter obligation on SBC Ameritech, the Illinois Act explicitly does. It is not physically impossible to make both offerings available and to provide any requesting carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to network elements on any unbundled or bundled basis, as requested, at any technically feasible point. Similarly, even if the Federal Act did not require SBC Ameritech to share its network with competitors for the provision of intraLATA toll service, Section 13-801(d) does. It is not physically impossible to make both offerings available simultaneously.

By authorizing the states to provide additional requirements, it is the express intent of Congress that states could impose obligations which are not identical to the federal obligations, but are in addition thereto. The State of Illinois has expressly imposed such obligations on SBC Ameritech and has mandated the Commission to enforce them.

CONCLUSION

Wherefore, for the reasons stated herein, Data Net Systems, L.L.C. and the Illinois Public Telecommunications Association respectfully request the Illinois Commerce Commission to require Illinois Bell Telephone Company to provide network elements to competitive local exchange carriers for the provision of any and all telecommunications services within the LATA, including intraLATA toll, and to further require Illinois Bell Telephone Company to provide network elements to a requesting telecommunications carrier on any bundled or unbundled basis,

as requested, for any existing or new telecommunications services, including new and additional lines, as required by the Illinois Public Utilities Act.

Respectfully submitted,

Data Net Systems, L.L.C.
Illinois Public Telecommunications Association

Michael W. Ward
One of their attorneys

September 20, 2001

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	
-vs-	)	
	)	**Docket No. 00-0700**
Illinois Bell Telephone Company, d/b/a	)	
Ameritech Illinois	)	
Investigation into Tariff Providing	)	
Unbundled Local Switching with	)	
Shared Transport	)	

NOTICE OF FILING

Please take notice that we have on this 20th day of September, 2001, filed with the Chief Clerk of the Illinois Commerce Commission via U.S. Postal Service first class mail postage prepaid, the Reply Brief of Data Net Systems, L.L.C. and Illinois Public Telecommunications Association, a copy of which is hereby served upon you.

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Association

CERTIFICATE OF SERVICE

I, Michael W. Ward, an attorney, hereby certify that copies of the above Notice, together with copies of the document referred to therein, have been served upon the parties to whom the Notice is directed via the U.S. Postal Service first class mail postage prepaid to the service list attached this 20th day of September, 2001.

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Michael W. Ward, Attorney

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